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Supreme Court, U.S.
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In The

Supreme Court of the United States

FLORA HOLLAND, WARDEN,

Petitioner,

v.

FRANK E. ADAMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

FRANK E. ADAMS Petitioner, v. FLORA HOLLAND, Warden Respondent.	)))))))	No. 3:99-0519

TO: The Honorable Robert L. Echols, Chief District Judge

REPORT AND RECOMMENDATION

(Filed June 30, 2000)

I. INTRODUCTION

This petition for writ of habeas corpus was filed under 28 U.S.C. § 2254 on June 14, 1999 (Docket Entry No. 1). Inmate Frank E. Adams ("Petitioner") alleges that he is being illegally detained by Flora Holland ("Respondent"), Warden of the Louis Deberry Special Needs Facility, Tennessee Department of Corrections. He alleges ten (10) grounds for relief.

For the following reasons, the Magistrate Judge recommends that Respondent's Motion to Dismiss be **GRANTED** as to issues 1b, 4, 5, 6, 9, and 10, and **DENIED** as to issue 7 (the Confrontation Clause claim), and that Respondent's Motion for Summary Judgment be **GRANTED** as to issues 1a, 2, and 3.

II. BACKGROUND

A. Factual Background

The facts of this case, as summarized by the Tennessee Court of Criminal Appeals ("TCCA") are as follows:

> The record establishes that on February 5, 1989, at about 2:30 a.m., the defendant and Timothy Allen Crowell robbed a convenience market clerk with a deadly weapon. One of the two remained outside as "look-out" and "getaway car" driver, but we are unable to determine from the record the precise role each played. At about 3:50 a.m. the same morning, the defendant and Crowell robbed and killed Thomas Weser, an exchange student at a local university.[1]

State v. Adams, 859 S.W.2d 359, 361 (Tenn. Crim. App. 1992), *perm. app. denied* (Tenn. 1993). More detailed facts will be provided where relevant.

B. Procedural History

Due to the procedural complexities of the proceeding before this Court, Petitioner's appellate efforts are summarized below:

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[1] In his petition, Petitioner avers that Mr. Crowell robbed the convenience store and shot the exchange student. Petitioner claims to have had no knowledge of Mr. Crowell's intentions as he thought Mr. Crowell was entering the store to purchase beer and cigarettes and stopping to use the bathroom. The two men had gone out that evening "only to party, only to drink beer and smoke a little, a couple of joints." (Docket Entry No. 23 at 1-2).

A jury found [Petitioner] guilty of felony-murder and two counts of aggravated robbery on February 14, 1991. He was sentenced to life imprisonment for the count of felony murder and ten years for each count of aggravated robbery, all to be served consecutively for an effective sentence of life plus twenty years.

[Petitioner's] motion for a new trial was denied. In his direct appeal, [Petitioner] raised four issues: the admission of his pretrial statements, the consolidation of the indictments for trial, the admission of a co-defendant's statement into evidence, and the ordering of consecutive sentences. The Court of Criminal Appeals of Tennessee affirmed his convictions on October 29, 1992. To the Tennessee Supreme Court, [Petitioner] raised only one issue – the consolidation of the indictments for trial. In its denial of his application to appeal on June 28, 1993, the Court stated that it had considered "the application for permission to appeal and the entire record in this cause," implying that all claims had been considered.

[Petitioner] filed a pro se petition for post-conviction relief on October 21, 1993. On May 31, 1995, with the assistance of counsel, [Petitioner] filed an amended petition. The post-conviction petitions before the trial court alleged ineffective assistance of trial counsel. The trial court conducted an evidentiary hearing on the petition on July 5, 1995, and denied post-conviction relief on July 17, 1995. [Petitioner] filed a notice of appeal on May 13, 1996; this notice was not timely filed, however the Court of Criminal Appeals waived the requirement of timely notice and accepted the petition "in the interest of justice."

> In his post-conviction petition to the Tennessee Court of Criminal Appeals, [Petitioner] raised two issues – the ineffective assistance of trial counsel and an invalid jury instruction on reasonable doubt. The Court of Criminal appeals affirmed the trial court's denial of the petition on December 30, 1997, addressing the merits on both issues.
>
> [Petitioner] appealed both issues to the Tennessee Supreme Court in a pro se petition, in which he included an additional claim regarding the ineffective assistance of post-conviction counsel. The Tennessee Supreme Court denied his application for permission to appeal on June 8, 1998.

(Docket Entry No. 23 at 2-4).

On June 24, 1999, the Honorable Robert L. Echols, Chief District Judge, found that the instant complaint was not facially frivolous and directed Respondent to answer (Docket Entry No. 3). On July 16, 1999, the Tennessee Attorney General, on behalf of Respondent, moved to dismiss and for summary judgment (Docket Entry No. 4) on the grounds set forth in its memorandum in support of such motion, also filed on July 16, 1999 (Docket Entry No. 5). Thereafter, then-Magistrate Judge Haynes appointed the Federal Public Defender to represent Petitioner in this action (Docket Entry No. 12, entered August 26, 1999).

On December 8, 1999, this case was reassigned to the undersigned Magistrate Judge after Judge Haynes' appointment to the District Court (Docket Entry No. 22).

Petitioner filed an amended Petition for Writ of Habeas Corpus on December 27, 1999 (Docket Entry No. 23). Respondent then submitted an Amended Motion to

Dismiss and for Summary Judgment with a supplemental Memorandum of Law on January 21, 2000 (Docket Entry Nos. 27 and 28). Petitioner's reply brief was filed on February 11, 2000 (Docket Entry No. 29).

The petitioner alleges the following grounds for relief:

1a. Petitioner was denied effective assistance of counsel at trial;

1b. Petitioner was denied effective assistance of counsel on direct appeal;

2. The trial court erred when it improperly ordered the consolidation of the indictments for trial in violation of the Fifth and Fourteenth Amendments, and this error was not harmless;

3. The trial court's reasonable doubt instruction unconstitutionally misstated the prosecution's burden of proof;

4. Petitioner was denied effective assistance of post-conviction counsel;

5. The trial court erred when it improperly denied Petitioner's Motion to Suppress his statements obtained in violation of his Fifth Amendment right to Miranda Warnings and Sixth Amendment right to counsel;

6. The trial court erred and violated Petitioner's Fifth Amendment right to due process when it found that Petitioner was a dangerous offender and gave him consecutive sentences for the two counts of aggravated robbery;

7. Petitioner's Confrontation Clause rights and his right to due process were violated by the admission of a statement of his co-defendant,

and this constitutional violation was not harmless;

8. (Omitted – No allegation);

9. Petitioner is actually innocent of the crimes for which he has been convicted;

10. The trial court erred and violated Petitioner's Fifth Amendment right to due process when it refused to enter a judgment of acquittal although the evidence against petitioner was insufficient as a matter of law.

(Docket Entry 23).

III. ANALYSIS

"State prisoners . . . may file a 28 U.S.C. § 2254 petition for writ of habeas corpus to challenge the constitutionality of their state court convictions, after exhausting all available state court remedies." *Clemmons v. Sowders*, 34 F.3d 352, 354 (6th Cir. 1994); *see* 28 U.S.C. § 2254(b). This exhaustion requirement springs from considerations of comity between the states and federal government and is designed to give the state an initial opportunity to pass upon and correct alleged violations of its prisoners' rights. *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). To satisfy the exhaustion requirement, the petitioner must present every claim raised in the federal petition to each level of the state courts. *Picard v. Connor*, 404 U.S. 270, 276, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); *Doctor v. Walters*, 96 F.3d 675, 678 (3rd Cir. 1996). Section 2254(c) provides that a habeas petitioner "shall not be deemed to have exhausted [state court] remedies . . . if he has the right under [state] law . . . to raise, by any available procedure, the question presented." *See Dennis v.*

Mitchell, 68 F. Supp. 2d 863, 878-79 (N.D. Ohio 1999). Once the petitioner's claims have been raised in the state's highest court, the exhaustion requirement is satisfied, even if that court refused to consider them. *Manning v. Alexander*, 912 F.2d 878, 883 (6th Cir. 1990).

Section 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court recently revisited the standards of review for a § 2254(d) appeal. The "contrary to" prong allows a federal habeas court to grant a writ if "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000). Furthermore, the "unreasonable application of" prong applies when "the state court identifies the correct legal

principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The state court's application must be clearly unreasonable as opposed to merely erroneous or incorrect. *Id.* at 1522.

The doctrine of adequate and independent state grounds applies to bar a federal habeas action when a state court declined to address a prisoner's federal claims because the prisoner failed to meet a state procedural requirement. *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750.

The existence of cause for a procedural default will ordinarily turn on whether the petitioner can show that some objective factor that was external to the defense impeded or prevented compliance with the state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Actual prejudice has been suffered when the improprieties upon which petitioner bases his claim "infect[ed] his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982).

In the instant case, Respondent has moved for dismissal or summary judgment with respect to all grounds for relief raised in the petition.

A. The Motion to Dismiss

Respondent has moved to dismiss grounds 1b, 4, 5, 6, 7, 9, and 10.

Ground 4: Ineffective Post-Conviction Counsel

Respondent argues that the allegation of ineffective assistance of post-conviction counsel is without merit as it is not a proper ground for habeas relief (Docket Entry No. 28 at 4-5, *citing Coleman*, 501 U.S. at 752).

Petitioner argues that an exception to this rule should exist when a constitutional claim can only be brought for the first time at the post-conviction level (Docket Entry No. 29 at 5). Petitioner believes that his right to effective appellate counsel should then extend to include effective post-conviction counsel, since his appellate counsel allegedly did not meet the minimum proscribed professional standards (*Id.*). "To conclude otherwise would mean that the defendant was not entitled [in] any forum to the effective assistance of counsel in presenting a constitutional claim" (*Id.*).

Though the Magistrate Judge finds Petitioner's arguments compelling, such a holding would eviscerate *Coleman*. "There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman*, 501 U.S. at 752 (internal citations omitted). For ineffective assistance of counsel to constitute cause, there must be "'a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that 'some interference by officials' . . . made compliance impracticable.'" *Id.*

at 753 (*quoting Carrier*, 477 U.S. at 488). "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Id.* (internal citations omitted). When the state has no responsibility to guarantee competent counsel, "it is the petitioner who must bear the burden for failure to follow state procedural rules." *Id.* at 754.

As Ground 4 is inappropriate for habeas review, the Magistrate Judge concludes this ground must be **dismissed**.

Respondent contends that Grounds 1b, 5, 6, 7, 9, and 10 should be dismissed on grounds of Petitioner's procedural default.

Ground 1b: Ineffective Assistance of Appellate Counsel

While this issue is procedurally defaulted since it was not presented during Petitioner's collateral appeals to the Tennessee Court of Criminal Appeals ("TCCA") or Tennessee Supreme Court (Docket Entry No. 28 at 8), Petitioner asserts that the ineffective assistance of post-conviction counsel is adequate cause to excuse the default. Since petitioner has no right to effective post-conviction counsel, it logically follows that ineffective post-conviction counsel cannot constitute cause to excuse the procedural default. *See Colman, supra*. However, regardless of the procedural posture of this ground, it does not appear that Petitioner has stated a claim for constitutionally ineffective assistance of appellate counsel.

Petitioner believes his appellate counsel's failure to preserve certain issues for post-conviction and habeas review was not strategic and fails to meet the required reasonable standard of competency (Docket Entry No. 29 at 4).

Appellate counsel is not required to raise *every* non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). While Petitioner may disagree with some of his counsel's tactical decisions, "strategic choices made after a thorough examination of the law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonably [sic] precisely to the extent that reasonable professional judgments support the limitations on investigation." *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) (*quoting Strickland*, 466 U.S. at 690-91).

While ineffective assistance of appellate counsel may, in certain instances, constitute appropriate grounds for federal habeas review, the Magistrate Judge does not believe this case to be one of those instances.

Ground 5: Improper Denial of Motion to Suppress

Petitioner avers that the trial court improperly denied his motion to suppress statements he made that were obtained in violation of his Fifth Amendment right to Miranda warnings and his Sixth Amendment right to counsel. This ground concerns two statements: (1) one that was made during a questioning prior to Miranda rights being read and (2) another that was made after he was

taken to police headquarters. The TCCA described the circumstances surrounding the statements:

> Police investigators had developed him as a suspect, and they found him at the home of his female friend. The investigators invited him to accompany them to their police van. Equipped with a writing desk and tape recorder, the van served as a "field office."
>
> Once inside the van, Robert Moore, a detective sergeant, told Adams:
>
> > This is a very serious conversation we need to have. It's a serious matter that we feel like you may be involved with. And it concerns a death of Thomas Weser on the Vanderbilt campus.
>
> Moore took extraordinary pains to make Adams understand that he was not under arrest and that he was free to leave the van whenever he wished. Moore also emphasized to Adams that not enough information had been developed at that point to justify arresting him. Moore then asked Adams, "Are you involved in this case?" Adams answered, "Yes, but I did not shoot the man. I was there." Adams then described the vehicle used in the commission of the crime.
>
> At this point, Moore advised Adams of his rights under Miranda and asked him to ride with him or meet him at police headquarters. Adams chose to ride in the van. Upon arrival at headquarters, Moore assigned Detective Mike Smith to continue the investigation, introduced Adams to Smith, and left the two alone.
>
> Smith advised Adams of his Miranda rights, and Adams signed a waiver of those rights. He related some of the details of the crime to Smith.

> He reiterated that Crowell, not he, had killed Weser. Once Adams understood that he would be charged with the murder of Weser anyway, he asked to talk to his lawyer. The lawyer of his choice was contacted, and he talked to her. While being escorted to the magistrate's chambers, Adams told Smith, "Tell them I cooperated."

859 S.W. 2d 359, 361 (Tenn. Crim. App. 1992).

Judge Birch upheld the admission: "Findings of fact made by the trial judge after an evidentiary hearing of a motion to suppress are afforded the weight of a jury verdict, and this court will not set aside the trial court's judgment unless the evidence contained in the record preponderates against his findings". *Id.* at 362 (internal citations omitted).

Petitioner contends that his initial statement should have been suppressed as it was made during a custodial interrogation before he was advised of his *Miranda*[2] rights (Docket Entry No. 29 at 11). Petitioner argues that being the focus of two detectives' questioning in the cramped environment of a police mobile interrogation unit amounts to a custodial interrogation (*Id.* at 11-12). Petitioner further avers that the second statement should have been suppressed as unlawful "fruit of the poisonous tree." *See Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Moreover, Petitioner believes that the alleged ineffective assistance of appellate counsel he received is "cause" sufficient to excuse procedural default

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

of these Fifth and Sixth Amendment claims (Docket Entry No. 29 at 12).

Since appellate counsel chose not to appeal this issue to the Tennessee Supreme Court on the direct appeal, the issue was not preserved for habeas review and is procedurally defaulted. The procedural default may be excused allowing habeas review if the petitioner can demonstrate sufficient "cause and prejudice". *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). The United States Supreme court recently held that a procedurally defaulted ineffective-assistance claim could serve as cause to excuse the procedural default of another habeas claim if "cause and prejudice" exists with respect to the ineffective-assistance claim. *Edwards v. Carpenter*, 529 U.S. ___, 120 S. Ct. 1587, 1590, 68 U.S.L.W. 4308 (April 25, 2000) (No. 98-2060). Because the ineffective assistance of post-conviction counsel can not serve as cause for the defaulted ineffective assistance of appellate counsel claim, the appellate counsel issue can not be considered as cause for the default of ground 5. However, in recognition of the circular nature of these standards and so as to avoid a potential miscarriage of justice, the Magistrate Judge will consider cause shown and proceed to a consideration of prejudice.

Petitioner must demonstrate actual prejudice rather than the "mere possibility of prejudice" resulting from the alleged constitutional error." *Russ v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Actual prejudice "must be a result of the alleged constitutional violation and not a result of the trial counsel's failure to meet state procedural guidelines." *Maupin*, 785 F.2d at 139. "[I]n analyzing the petitioner's contention of prejudice, the court should assume that the

petitioner has stated a meritorious constitutional claim . . . [and evaluate] whether [the petitioner] would have been prejudiced by such an error." *Id.* at 130 (*citing Frady*, 456 U.S. at 170-72). Assuming that appellate counsel was ineffective, prejudice exists since the claims are now barred from subsequent review. Therefore, the Magistrate Judge will deem the procedural default excused and turn to the merits of the claim.

Finding that "Smith had fulfilled the Miranda requirements and concluded that Adam's [sic] in-custody statement was a voluntary one," the TCCA affirmed the trial court's decision. 859 S.W.2d at 361-62.

§2254(d) allows the issuance of a writ of habeas corpus when the state decision is "contrary to" or an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court."

When determining whether a petitioner was a subject of a custodial interrogation triggering *Miranda* requirements, "a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" *Stansbury v. California*, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994). The trier of fact must evaluate "the objective circumstances of the interrogation" and not "the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 323. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* (*quoting Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). Warnings are not required just because the questioned person is a

"focus" or a suspect of the investigation but rather when there has been "such a restriction on a person's freedom as to render him in custody." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (per curiam); *California v. Beheler* 463 U.S. 1121, 1124 n2, 103 S. Ct. 3517, 77 L. Ed. 2d 275 (1983) (per curiam); *Minnesota v. Murphy*, 465 U.S. 420, 431, 104 S. Ct. 1136, 79 L. Ed.2d 409 (1984). *See also Stansbury, supra* at 324.

The petitioner and the detectives gave conflicting accounts of the questioning. Petitioner claims that he was handcuffed immediately upon entering the van, that he was not free to leave, and that he immediately requested his attorney upon entering the van (Docket Entry No. 20, Attachment, Transcript of Suppression Hearing at pp 68-70). In contrast, the detectives describe an amicable discussion in a van with the door open at all times with an unrestrained Petitioner, who was repeatedly assured that he was free to go at any time, and who could in fact leave at any point without officer assistance (*Id.* at 14-30).

The trial judge held that the statements were voluntary as Petitioner was not the subject of a custodial interrogation (*Id.* at 90). The trial court further found that Petitioner voluntarily gave the second statement after signing a waiver of rights and that the questioning was terminated upon invocation of his right to counsel. (*Id.* at 91).

State court determinations of fact are presumed to be correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(2). After a thorough review of the entire record, the Magistrate Judge finds neither sufficient evidence to overcome the presumption of correctness afforded state courts findings, nor any rationale

supporting the contention that the trial court's determination was an unreasonable application of federal law. Consequently, the Magistrate Judge believes this ground should be dismissed as without merit and that Petitioner's statements were properly admitted.

Ground 6: Consecutive Sentencing

Petitioner believes habeas review of his sentencing is necessary inasmuch as his Fifth Amendment right to due process was violated when the court ordered consecutive sentences. In addition, Petitioner alleges that the ineffective assistance of appellate counsel is sufficient cause to excuse the procedural default.

Petitioner fails to articulate how his due process rights are implicated. Petitioner's Fifth Amendment rights are not implicated as sentencing issues are matters of state law. Since federal reviewing courts are bound by state court determinations of state law, the Magistrate Judge rejects Petitioner's contentions as inappropriate for federal habeas review. *See Estelle v. McGuier*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("[i]t is not the province of a federal habeas court to re-examine state-court determinations on state-law questions."); *Caldwell v. Russell*, 181 F.3d 731, 736 (6th Cir. 1999). The Magistrate Judge finds this ground should also be dismissed.

Ground 7: Confrontation Clause Claim

Petitioner's claim that his Confrontation Clause rights were violated when his co-conspirator's statement was improperly admitted into evidence also falls into the category of the above two claims where the ineffectiveness

of appellate counsel serves as cause to allow the Magistrate Judge to examine the merits of the issue.

A state witness testified that Petitioner and his co-defendant, Crowell, were together shortly before and shortly after the robbery and killing. 859 S.W.2d at 363. The witness testified to hearing Crowell say that "he'd shot someone before and he could shoot [another person] also." *Id.* To counter this testimony suggesting that Crowell was the shooter, the state offered the testimony of an investigative detective who claimed that Crowell accused Petitioner of being the shooter. *Id.* After the detective's statement, the trial judge "cautioned the jury that the testimony was to be considered only as if [sic] it might affect the credibility of Crowell's statement as contained in [the witness'] testimony." *Id.* Over objections, the trial court found the statement admissible under Rule 806[3] of the Tennessee Rules of Evidence. *Id.* The TCCA also found that the admission of the statements was authorized under rule 806 and that the limiting instruction given by the court was sufficient. 859 S.W.2d at 363.

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[3] Rule 806 of the Tennessee Rules of Evidence provides:

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

The Sixth Amendment guarantees an accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause "ensure[s] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). The Confrontation Clause permits the admission of hearsay evidence when the witness is unavailable and the statement is clearly reliable. *Idaho v. Wainwright*, 497 U.S. 805, 814, 100 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 815.

In 1999, the Supreme Court addressed this exact issue: the reliability of a confession by an accomplice which incriminates a criminal defendant, *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). In *Lilly*, an accomplice told police during questioning that the petitioner actually stole a gun and shot someone. (*Id.* at 1889). At petitioner's trial, when the accomplice invoked his Fifth Amendment right against self-incrimination, the trial court admitted the accomplice's statements during questioning under the hearsay exception of a declaration of an unavailable witness against penal interest. The petitioner objected as the statements shifted the blame from the accomplice to the petitioner, violating the Sixth Amendment Confrontation Clause. (*Id.* at 1890). The petitioner was subsequently convicted.

On appeal, the Virginia Supreme Court found the admission constitutional since it fell within a "firmly rooted" hearsay exception. The United States Supreme Court disagreed and reversed.

After tracing the history of hearsay exceptions, the *Lilly* court addressed the category of statements like the one in the instant case. They found that those hearsay statements are "inherently unreliable" and "ought to be received with suspicion. . . . '" *Id.* at 131 (*quoting Crawford v. United States*, 212 U.S. 183, 204, 29 S. Ct. 260, 53 L. Ed. 465 (1909). As such, the *Lilly* court held that "accomplice's confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Id.* at 134. These statements carry a presumption of unreliability that may be rebutted with "particular guarantees of trustworthiness." *Id.* at 136. While instructing courts to independently review the factual circumstances surrounding the hearsay statement, the *Lilly* court doubted the presumption of unreliability could be overcome when the government was highly involved in the statement's production. *Id.* at 137. Although corroborating evidence existed, the Court found the statements in question to have violated the petitioner's Confrontation Clause rights. *Id.* at 139. Thus, the appropriate standard of review is whether the hearsay evidence "possess[es] indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial[4]." *Id.* at 138 (*quoting Wright*, 497 U.S. at 822).

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[4] "When a court can be confident – as in the context of hearsay falling within a firmly rooted exception – that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility,' the Sixth Amendment's residual trustworthiness test allows the admission of the declarant's statements." *Id.* at 136 (*quoting Wright*, 497 U.S. at 820). "But the

(Continued on following page)

In the case sub judice, Crowell's accusatory statement is clearly the type contemplated by *Lilly*. While a limiting instruction was given, limiting instructions are an inadequate remedy; "the effect is the same as if there was no limiting instruction at all." *Bruton v. United States*, 391 U.S. 123, 137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Consequently, the Magistrate Judge must determine whether Crowell's statements bore "sufficient indicia of reliability" as to be "inherently reliable." Just as in *Lilly*, Crowell was in custody for a serious crime, "made his statement[ ] under the supervision of governmental authorities," and "had a natural motive to attempt to exculpate himself as much as possible." *Id.* at 139. Consequently, the Magistrate Judge believes Crowell's statement to be unreliable and the admission thereof violative of Petitioner's Confrontation Clause right.

Finding that the admission was clearly erroneous, the Magistrate Judge believes this ground to be meritorious and that it should be preserved for further review.[5] If this Report and Recommendation is adopted by the District Court, a hearing will be necessary to determine if the error was harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1992) (holding that an error was not harmless if "the error had a substantial and

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surrounding circumstances relevant to a Sixth Amendment admissibility determination do not include the declarant's in-court demeanor (otherwise the declarant would be testifying) or any other factor uniquely suited to the province of trial courts." *Id.* at 137.

[5] The parties did not have the benefit of the *Lilly* case when they submitted their briefs. However, the *Lilly* court made it clear that they were reiterating a well-established rule, rather than announcing a new rule of law. 527 U.S. at 133.

injurious effect or influence in determining the jury's verdict.").

Ground 9: Actual Innocence

Petitioner asserts his actual innocence as he was not involved in the murder and robbery of Thomas Weser or the convenience store robbery. In both instances, he claims to have been merely present in the automobile and ignorant of his co-defendant's intentions (Docket Entry No. 23 at 21-22; Docket Entry No. 29 at 18). Petitioner further contends that the nine alleged independent Constitutional violations asserted herein "'probably resulted in the conviction of one who is actually innocent'" (Docket Entry No. 29 at 18 (*citing Carrier*, 477 U.S. at 496)). Without stipulating the exact nature thereof, Petitioner believes that he can show proof of his actual innocence at an evidentiary hearing.

Respondent argues this issue should be dismissed as procedurally defaulted, as it has not been raised in any prior state proceeding (Docket Entry 28 at 7). Respondent further contends that neither new evidence nor an independent constitutional violation which could not have been previously discovered through the exercise of due diligence have been presented here (*Id.*). Petitioner neither argues cause and prejudice nor presents new evidence.

Legitimate claims that a constitutional error has resulted in the conviction of an innocent person are extemely [sic] rare. *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L.Ed.2d 828 (1998). "To be credible, such a claim requires

petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* Furthermore, the petitioner must demonstrate that it is more likely than not that a reasonable juror would have acquitted him in light of the new evidence. *Id.* at 327; *Bousley*, 523 U.S. at 623. "In assessing the adequacy of petitioner's showing, . . . the reviewing tribunal . . . [may] consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.*

Even if the Magistrate Judge were to excuse the procedural default, Petitioner provides no new documentary evidence of his factual innocence not presented at trial, but only conclusory allegations of prejudice from alleged constitutional errors. Absent such a showing of factual innocence, review is inappropriate. The Magistrate Judge believes this issue should be dismissed.

Ground 10: Insufficiency of Evidence

Finally, the petitioner challenges the constitutional sufficiency of the trial evidence supporting his conviction. However, he procedurally defaulted that contention by neglecting to assert it via his petition for review before the Tennessee Supreme Court. *See Carrier*, 477 U.S. at 485. A federal habeas forum may excuse a procedural default if a "fundamental miscarriage of justice" will otherwise result. *Coleman*, 501 U.S. at 750. Petitioner avers that fundamental justice requires the Magistrate Judge, on collateral review, to reevaluate the constitutional sufficiency of the trial evidence. Petitioner believes that, at most, the evidence supports a conviction of the lesser included

offense of accomplice liability (Docket Entry No. 23 at 22). Supporting his contention, Petitioner refers to his co-defendant's failure to testify and that no one could identify or place Petitioner at the scenes of the crimes (*Id.*). Even if the Magistrate Judge were to excuse the procedural default, the outcome would not change.

Trial evidence is sufficient to support a conviction if, after viewing the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the prosecution, the reviewing court can conclude that a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

In the case sub judice, after evaluating all the evidence and testimony, the jury concluded that Adams was in fact guilty of the charges presented. Petitioner maintained his innocence at all relevant times. However, a defendant may be convicted of a crime in accordance with due process strictures "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 315. Although this issue is not ripe for review as Petitioner has not made the requisite cause and prejudice showing, the Magistrate Judge believes that Petitioner has also not sufficiently demonstrated that "any rational trier of fact could [not] have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Consequently, the Magistrate Judge finds that this issue should be dismissed.

B. Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2538, 2553, 91 L. Ed. 2d 265 (1986). The substantive law governing the claims will identify which facts are material. In determining whether the movant has met its burden, the Court must view the evidence in light most favorable to the non-moving party. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

In order to defeat the motion, the non-moving party is required to show, after an adequate time for discovery, that a genuine issue of fact exists as to every essential element of that party's case upon which he will bear the burden of proof at trial. *Celotex Corp.*, 106 S. Ct. at 2553. In making this showing, the non-moving party may not merely rest on conclusory allegations contained in the compliant [sic], but must produce affirmative evidence supporting her claims. *Id.* In order to create a genuine factual issue, the non-moving party must show "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

Ground 1a: Effectiveness of Trial Counsel

Petitioner argues that there are five grounds on which his trial counsel was ineffective: (1) for failing to interview witnesses, (2) for failing to challenge inconsistent testimony, (3) for failing to investigate and impeach the co-defendant's credibility regarding prior drug use, (4) for failing to challenge an in-court identification, and (5) for failing to object to the jury instruction on reasonable doubt. (Docket Entry No. 23 at 5).

On collateral appeal, the TCCA noted:

> The trial court also addressed the Petitioner's contention that defense counsel failed to investigate the case adequately. Mr. Dean testified that their investigator conducted a thorough investigation, and that they explored the statements made by the co-defendant and investigated the crime scene. The office spent twenty-eight hours or more on the case.
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> The trial counsel also found that counsel's failure to interview Lisa Cantrell's parents did not overcome the presumption that Mr. Dean's decision was trial strategy. . . . Also, the trial court found that counsel legitimately did not introduce evidence of the co-defendant Crowell's drug use because he felt there had been sufficient testimony presented by the State. . . . In its conclusion, the trial court found that Mr. Dean and Ms. Dykes had significant trial experience and that they were well-prepared for the trial. As a result,

> their representation was well within the necessary range of competence for criminal defense attorneys.

Adams v. State, No. 01C01-9606-CR-00401, 1997 WL 803585, at *4 (Tenn. Crim. App. Dec. 30, 1997). The TCCA concluded that the evidence did not preponderate against the trial court's conclusion that petitioner received competent representation. Nor did they find sufficient prejudice to Petitioner. *Id.* at *5.

The issue of ineffective assistance of counsel is a mixed question of law and fact. *Rickman v. Bell*, 131 F.3d 1150, 1153, (6th Cir. 1997); *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996). Mixed questions of law and fact follow the unreasonable application prong of § 2254(d). *See Nevers v. Killinger*, 169 F.3d 352, 358 (6th Cir. 1999). "Unreasonable" does not mean "incorrect." *Williams v. Taylor*, 120 S. Ct. 1495, 1522 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.*

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the petitioner must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness. While examining counsel's overall performance, the errors must have been so egregious that counsel was not functioning in that role. *Id.* His acts or omissions must have

been "outside the wide range of professionally competent assistant." *Id.* at 690. Second, the petitioner must demonstrate that he was prejudiced by his counsel's deficient performance. *Id.* at 687. Prejudice exists if there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Furthermore, counsel's performance must have been so deficient that it "renders the result of the trial unreliable, or proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993).

Petitioner's counsel is presumed to have been competent unless Petitioner is able to clearly demonstrate otherwise. *See United States v. Pierce*, 63 F.3d 818, 833, (6th Cir. 1995). Not only does Petitioner present solely conclusory allegations of prejudice with little to no concrete factual support, (*see* Docket Entry No. 23 at 5-6 and Docket Entry No. 29 at 2-3), but Petitioner also fails to demonstrate how the State's determination is an unreasonable application of Supreme Court precedent. In contrast, the *Williams* court found ineffective assistance of counsel when:

> The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. . . . They filed [sic] to conduct an investigation that would have uncovered extensive records graphically describing William's nightmarish childhood, . . . that William's parents had been imprisoned for criminal neglect of Williams . . . that Williams had been severely and repeatedly beaten by his father, . . . that Williams was "borderline mentally retarded" and did not advance beyond the sixth grade in school. . . . They failed to seek prison

> records recording Williams' commendations for helping crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." . . . Counsel failed to even return the phone call of a certified public accountant who had offered to testify when Williams was incarcerated as part of a prison ministry program.
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> . . .
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> Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of defendant's background.

Williams, 120 S. Ct. at 1514-15. Petitioner fails to present evidence of an even remotely similar nature. As such, the Magistrate Judge finds that the evidence does not demonstrate any issue of material fact and that summary judgment for Respondent is appropriate on this issue.

Ground 2: Consolidation of Indictments

Petitioner alleges that the trial court's consolidation of his indictments violated his Fifth and Fourteenth Amendment rights (Docket Entry No. 29 at 6).

In arguing for consolidation, the State argued that the crimes were committed with the same intent: obtaining money with which to purchase drugs. The State believed the cases "overlapped" sufficiently to establish a common plan or scheme.

The trial court found consolidation of the indictments appropriate under Rules 8 and 13 of the Tennessee Rules of Criminal Procedure: "offenses that constitute part of a common scheme or plan or . . . [are] of the same or similar character," and offenses that could have been joined in a single indictment. The trial court also relied upon *State v. Peacock*, 638 S.W.2d 837 (Tenn. Crim. App. 1982), finding "two or more offenses must be so similar in modus operandi and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offenses were committed by the same person(s)." *Id.* at 840. However, *Peacock* continues: "[t]he mere fact that a defendant has committed a series of armed robberies, or a series of rapes, or a series of crimes does not mean that they are part of a common scheme or plan although the offenses may be of the same or similar character." *Id.*

The TCCA held the indictments to have been erroneously consolidated, but that the error was harmless. 859 S.W.2d at 363.

Petitioner contends that the erroneous consolidation deprived him of his right to a fair trial and that the evidence does not support a finding of harmless error beyond a reasonable doubt. Petitioner believes he was prejudiced in that the State used evidence obtained in the murder of Weser to convict him of the convenience store robbery. Petitioner further contends that there is absolutely no evidence that he was involved in the convenience store robbery (Docket Entry 23 at 8). Petitioner also claims that the consolidation allowed the State to put forth the theory that Petitioner planned the criminal escapades with Crowell, with no supporting evidence (Docket Entry No. 29 at 7).

"The consolidation of indictments, or of counts in the indictment, is generally within the discretion of the trial court and its action will not be reversed in the absence of an abuse of that discretion." *Moeller v. United States*, 378 F.2d 14, 15 (5th Cir. 1967). *See also United States v. Haygood*, 502 F.2d 166 (7th Cir. 1974), *cert denied*, 419 U.S. 1114 (1975). To prevail, a petitioner must clearly demonstrate that the jury was unable to distinguish the facts and evaluate each count of the indictment separately. *See United States v. Gallo*, 763 F.2d 1504, 1525 (6th Cir. 1985); *United States v. Fajardo*, 966 F.2d 1454, 1992 WL 127022 (6th Cir. (Mich.), June 9, 1992). The evaluating court must examine the trial record as a whole, ignoring harmless errors. *United States v. Lane*, 474 U.S. 438, 445, 106 S. Ct 725, 88 L. Ed. 2d 814 (1986).

An error is harmless if it does not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1992). The TCCA concluded the error was harmless "because the evidence of guilt adduced against [Petitioner] in both cases was abundant and legally sufficient. In our view, the result would have been the same were the cases tried before different juries." 859 S.W.2d at 363.

The Magistrate Judge fails to see how the TCCA's determination of harmless error "was an unreasonable determination of facts in light of the evidence presented in the State court proceeding." §2254(d)(2). Consequently, the Magistrate Judge believes habeas review to be inappropriate and recommends that summary judgment be granted for Respondent on this issue.

Ground 3: Jury Instruction on the Burden of Proof

Petitioner contends that the jury instruction misstated the necessary burden of proof. Although this issue was not raised before the trial court, petitioner included it in his collateral appeals to the TCCA and the Tennessee Supreme Court. TCCA found the issue to be without merit though improperly before the court. *Adams*, 1997 WL 803584 at *4. TCCA also noted that the Tennessee Supreme Court had recently affirmed a decision holding that similar language did not constitute a due process violation. *Id.*

Petitioner contends that the instruction was unconstitutional as it stated that the "jurors were told that they needed only to reach a 'satisfactory conclusion' [that Petitioner] committed the offense; that they only be 'morally certain[ ] of his guilt; and that they could convict merely if they could 'let the mind rest easily upon the certainly [sic] of guilt'" (Docket Entry No. 23 at 10-11). The instruction actually read:

> When the evidence is made up entirely of circumstantial evidence, then before you would be justified in finding the defendant guilty, you must find that all the essential facts are consistent with the hypothesis of guilty, as that is to be compared with all the facts proved; the facts must exclude every other reasonable theory or hypothesis except that of guilt; and the facts must establish such a certainty of guilt of the defendant as to convince the mind beyond a reasonable doubt that the defendant is the one who committed the offense. It is not necessary that each particular fact should be proved beyond a reasonable doubt if enough facts are proved to satisfy the jury beyond a reasonable doubt of all

> the facts necessary to constitute the crime charged. Before a verdict of guilty is justified, the circumstances, taken together must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing, in effect, a moral certainty that the defendant, and no one else, committed the crime.
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> * * *
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> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required as to every proposition of proof requisite to the offense.

(Docket Entry No. 23 at 8; r.15, Addendum 7, Jury Instructions, p. 732-33). Petitioner believes this instruction is unconstitutional because it provides a lesser standard than the strenuous "beyond a reasonable doubt' standard. *See Cage v. Louisiana*, 498 U.S. 39, 40, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990).

In contrast, Respondent contends that the claim should be rejected as the instruction is "nearly identical" to that upheld in *Austin v. Bell*, 126 F.3d 843, 846 (6th Cir. 1997), *cert. denied*, 532 U.S. 1079, 118 S. Ct. 1526, 140 L. Ed. 2d 677 (1998) (Docket Entry No. 28 at 15). The relevant instruction in *Austin* stated:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise

> from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

Id. at 846. The Sixth Circuit held that the instruction was constitutional, it did not resemble the *Cage* instruction, and it did not lower the standard of proof. *Id.*

Jury instructions must be reviewed as a whole to determine whether they adequately and fairly informed the jury of relevant considerations and explained the applicable law. *United States v. Layne*, 192 F.3d 556, 574 (6th Cir. 1999) (citations omitted); *United States v. Harrod*, 168 F.3d 887, 890 (6th Cir. 1999) (citations omitted). "[T]o warrant habeas relief, jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair." *Scott v. Mitchell*, 209 F. 3d 854, 882 (6th Cir. 2000) (*citing Coe*, 161 F.3d at 329). "This burden is even greater than that required to demonstrate plain error on direct appeal. . . . The question in such a collateral proceeding is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, . . . , not merely whether the instruction is undesirable, erroneous, or even universally condemned")." *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977) (internal citations omitted).

The Magistrate Judge believes that Petitioner incorrectly argues that this instruction is "nearly identical" to

that overruled in *Cage*[6] and believes the language to be similar to the *Austin* instruction. The *Cage* court reviewed the charge by reference to what a reasonable juror would have found the charge to be and held that the words "grave" and "substantial" indicate a higher degree of doubt than that required, compelling the court to reverse the petitioner's conviction. *Id.* at 41. Those specific, highly charged words are not used in the instant charge. Furthermore, the Magistrate Judge is presented with no evidence showing the "ailing instruction so infected the entire trial that the resulting conviction violates due process." *Henderson*, 431 U.S. at 154. Consequently, the Magistrate Judge believes summary judgment for Respondent is appropriate on this issue as there is not any genuine issue of material fact.

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[6] The relevant instruction in *Cage* was:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilty [sic] beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

111 S. Ct. at 40.

IV. RECOMMENDATION

In light of the foregoing, the Magistrate Judge recommends that Respondent's Motion to Dismiss be **GRANTED** as to issues 1b, 4, 5, 6, 9, and 10, and **DENIED** as to issue 7, and that Respondent's Motion for Summary Judgment be **GRANTED**.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed in this Report in which to file any response to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation and can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

ENTERED this 28 day of June, 2000.

/s/ Joe B. Brown
JOE B. BROWN
United States Magistrate Judge